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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

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CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, FIRST COLLECTION DISTRICT OF ILLINOIS,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY AND MARY E. KAUFMAN, EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY M. WOLF, DECEASED,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THE DARTNELL-HARRIS PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OCTOBER TERM, 1941.

No. 1264.

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Petitioner,

vs.

THE NORTHERN TRUST COMPANY AND MARY E. KAUFMAN, EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY M. WOLF, DECEASED,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

In Petitioner's Notice to Respondents of the filing of the Petition for Certiorari in this cause, counsel for Petitioner states that no brief in support of the petition would be filed.

It is regretable that counsel for Petitioner, for reasons best known to himself, elected not to file a brief. We submit that this Court is entitled to the aid of a brief from Petitioner. Furthermore, we also submit that, in all fairness, counsel for Respondents were entitled to know what arguments and authorities counsel for Petitioner relied upon in support of the petition herein, so that they could advisedly meet and answer the arguments and authorities urged. May it not be a fair inference that no brief was

filed because of the fear that it would weaken, instead of strengthen, the petition filed herein.

In view of Petitioner's failure to file a brief, Respondents feel justified, and, in fact compelled to make somewhat more extended counter-suggestions than might otherwise have been necessary.

No Sufficient Reason for Granting the Writ Is Shown by the Petition.

Respondents respectfully submit that the reasons assigned by Petitioner (Pet. 5, 9) are not of the special and important character contemplated by Rule 38 of this Court.

For aught that appears from the record in this cause, the decision of the Circuit Court of Appeals involves merely its construction of Section 807, set out on pages 2, 3 and 7 of the Petition herein, and affects merely the individual interests and rights of the parties to this suit.

The only real reason assigned by Petitioner, as a reason for granting the writ, is the claim (Pet. 8) that the decision in this cause "is of considerable fiscal importance to the Government", and that Petitioner is advised by the Treasury Department that there are "a number of pending cases raising the identical issue involving over $22,000,000 in taxes", and that it is estimated "that a complete survey would disclose about 2000 cases with an aggregate estate tax liability of approximately $50,000,000, which would turn upon the issue herein."

It is only by the importation of this statement, quite outside the record, and of which this Court would not take judicial notice or cognizance, in contra-distinction, for instance, to decisions of reported cases, that counsel for Petitioner endeavors to give this case special significance. Otherwise, it is simply an isolated case between the parties to it. The fact that there are so many cases

pending *is due* to the action of the Commissioner, since he is the sole party on one side of these individual cases, with about 2000 separate citizen taxpayers on the other side. It does not, therefore, present a situation, in which the writ should be granted, because there are pending a great number of cases between various independent citizens, much less, cases in which there has been a conflict of decisions. In other words, the Internal Revenue Department is solely responsible on the one side, for all of these 2000 cases, in which it seeks to impose a tax liability of approximately $50,000,000.

The case at bar involves merely the construction of a statute, and the mere fact that there are a great number of cases pending involving the amount of money suggested, cannot and should not in any manner affect the decision or determination of this Court on its construction of the statute.

Furthermore, the fact that there are about 2000 cases pending, raising the same issue, and which would turn upon its determination; or, in other words, that there are this large number of cases in which 2000 taxpayers are independently insisting upon the contention Respondents urge in this cause, and which was sustained by the District Court and the Circuit Court of Appeals, indicates persuasively and strongly, we submit, that Respondents' contentions, as to the proper construction of Section 807, are sound.

It is to be assumed that the taxpayers in these cases are represented by attorneys, and that these lawyers all construe Section 807 as Respondents in the case at bar have done. We submit that when 2000 or more lawyers independently so construe Section 807, it is persuasive, if not, to all intents and purposes, conclusive proof that this construction and interpretation is proper.

It is to be presumed that the lawyers who drew the

Wills of these decedents did so in the light of their interpretation of Section 807, and that, in their view, the estates of their decedents were thereby made secure against the exactions sought to be imposed by the Commissioner.

It appears from the statement of counsel, that the Commissioner seeks to take $22,000,000 or $50,000,000 in the form of taxes from charities, and, we contend, is endeavoring to do this, to use the language of Judge Hough in the Slocum case (287 F., at page 655) "by deliberate and designed encroachment upon charities", the object of the bounty of about 2000 of our citizens in their Wills, and possibly more that have not yet been disclosed. He is asking this Court to sanction this endeavor on his part.

The statement of Petitioner does not indicate whether these 2000 cases are pending in Court, or, whether some of them, are merely pending in the Internal Revenue Department,—nor, if some of them are pending in Court, that any of them were initiated by the Commissioner for the purpose of getting a judicial determination of the proper construction of Section 807. For aught that appears, the cases pending in Court, if any, were instituted by the taxpayers involved, as was done in the instant case, where, as the record shows, the taxpayer paid under protest the tax assessed, and upon a refund being refused, instituted this suit. Section 807 was enacted in 1932. These 2000 cases must have accumulated over a number of years. It would seem that, as a matter of justice and right, the Commissioner, in view of the interpretation of Section 807 by some 2000 citizens and their lawyers, should long since, on his own initiative, or by his own action, have sought and brought about a judicial determination of the questions involved, and his right to impose the tax under his construction of Section 807.

In any event, the fact that there are some 2000 citizens insisting upon Respondents' interpretation of Sec-

tion 807, we respectfully submit, that the Commissioner should, as the Circuit Court of Appeals in this case indicated, have asked Congress to clarify the law to accord with the Commissioner's views, which could have been done "with very few words of unquestionable meaning", instead of seeking to impose his construction upon this great number of citizen taxpayers, and thereby impose upon them a tax of this enormous aggregate, *all at the expense of the charities involved.*

We urge that this petition should be refused, and that the Commissioner should be admonished by this Court, as did the Circuit Court of Appeals in the pending case, to address himself to Congress, to the end that the law be changed so that the citizen may reasonably understand its application, as required of tax-imposing statutes. The Petitioner has shown that this is not true of the law as it stands. Instead of seeking judicial legislation at the hands of this Court, the Commissioner should, we submit, address himself to Congress, the proper department of our Government.

We respectfully submit that it is not the function of this Court to aid in the collection of taxes, however large the amount, unless the tax law leaves no reasonable doubt of its application to the taxpayer involved, and that the petition fails to present a case contemplated by the Certiorari statute, and the rules of this Court, and that the writ should be denied.

QUESTIONS PRESENTED.

Under this head (Pet. 2), Petitioner undertakes to state the questions presented in this cause. We submit that this statement is quite inadequate and uninformative.

The contentions of the parties will be found fully stated in the Complaint (R. 2-6), the answer (R. 37-40) and the Reply (R. 41-44) to which we invite the Court's attention in this connection.

The real questions presented in this cause are simple and well defined and are as follows:

Respondents' Contention.

Respondents contend that Section 807, when construed, as it must be, in accordance with its plain and unambiguous language, has no application to the case at bar, because, under the law of Illinois, "the law of the jurisdiction under which the estate is administered," the Federal Estate Tax is payable *out of* the *general* or *gross estate* of the decedent, and is not "payable, in whole or in part, *out of* the *bequests, legacies* or *devises otherwise* deductible under this paragraph"—that is to say, in the instant case, are not payable *out of* Mr. Wolf's *residuary* bequests to charity.

The *residuary* bequests to charity are to

Michael Reese Hospital of Chicago.
The Visiting Nurse Association of Chicago.
The University of Chicago.
The Jewish Charities of Chicago.

As the decision of the Circuit Court of Appeals in this case (R. 217, 220) shows, Petitioner conceded throughout, in the District Court and in the Circuit Court of Appeals, that the Federal Estate Tax under the law of Illinois, is a "*paramount charge and expense of administration against the estate, and payable out of the general or gross estate*

of decedent." This was specifically held by the District Court and the Circuit Court of Appeals, the latter saying:

> "Hence, under that jurisdiction (Illinois) such tax *is not payable in whole or in part out of the residuary bequest to charity,*"

as provided by Section 807. Not being payable out of the residuary bequests to charity, Section 807, the District Court and the United States Circuit Court of Appeals held, has no application; and that, therefore, the decision of the Supreme Court in *Edwards* v. *Slocum*, 264 U. S. 61, (affirming, 287 Fed. (C. C. A. 2d) 651), controls the determination of this case. In fact the Circuit Court of Appeals in this case expressly found that Petitioner concedes that if Respondents' construction of Section 807 be upheld, then the decision of *Edwards* v. *Slocum* is decisive of this case.

As the Circuit Court of Appeals said:

> "Appellant (Petitioner) concedes that the facts in that case are substantially identical with those here, except as to the amount involved, and were it not for Section 807, the decision of the Supreme Court in *Edwards* v. *Slocum, supra,* would be controlling here."

In fact, this was stipulated (R. 79) as follows:

> "It is conceded and stipulated that if plaintiffs' theory and construction of Section 807 of the Revenue Act of 1932 is sustained by the Court, then plaintiffs are entitled in this proceeding to recover the sum of $119,069.43, with interest as provided by law," in accordance with the *Edwards* v. *Slocum* case.

Petitioner's Contention.

On the other hand, Petitioner contended, and still contends, that, though under Section 807, the Federal Estate Tax is *a charge* and *an expense of administration,* payable *out of the general or gross estate* by "the law of the jurisdiction under which the estate is administered," that is

to say the law of Illinois, nevertheless, within the scope and meaning of that section, it is "payable, in whole or in part, *out of* the *bequests*" to charities, because its payment operates to reduce the amount of the residue to charities.

Petitioner says (Pet. 8):

> "But the plain fact is that regardless of whether it may be a 'charge' against the entire estate in the sense of a lien or otherwise, it was nevertheless properly paid pursuant to Illinois law in such manner as to reduce the amount distributable to the residuary donees, with the consequence that the residuary bequests bore the economic burden; it was therefore paid 'out of' the residue within the meaning of Section 807."

The utter fallacy and groundlessness of this contention lies in the fact, that though its payment, under the law of Illinois as an expense of administration, does operate to reduce the amount of the residue going to charities, it does not operate to reduce the same *to nearly as great an amount*, or *extent*, as Petitioner seeks to do in this case by his misapplication of Section 807.

Petitioner concedes and has stipulated, as we have said, that if Respondent's construction of Section 807 be sustained, then the case of *Edwards* v. *Slocum* controls the case at bar, and that Respondents, in accordance with that case, correctly computed the Federal Estate Tax at $342,744.60 leaving and preserving $119,069.43, as the residue going to the charities.

On the other hand, the Commissioner, under his construction of Section 807, computed the Federal Estate Tax he seeks to impose at $459,879.57, leaving only $3,223.51 as a residue to charities, instead of $119,069.43.

And, we will point out, that, in order to arrive at this, he resorts to methods and expedients condemned by *Edwards* v. *Slocum*, by imposing *a tax upon a tax*, and employing *algebraic or other complicated calculations*, not within the

cognizance of the average taxpayer, and frowned upon by the Courts.

Under the Law of Illinois, the Federal Estate Tax Is Payable Out of the General or Gross Estate as an Expense of Administration, and Not Out of the Residue.

It is conceded by Petitioner that, under the law of Illinois, the Federal Estate Tax *is payable out of* the *general* or *gross* estate *as an expense of administration* and that this was squarely held in *People* v. *Pasfield*, 284 Ill. 450; *People* v. *The Northern Trust Company*, 289 Ill. 475; and *People* v. *McCormick*, 327 Ill. 547.

In *People* v. *Pasfield, supra*, concerning the payment of the Federal Estate Tax, it was said (p. 554):

> "As the duty (the Federal Estate Tax) is made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute, the duty is an expense or a charge *against the estate* of the decedent, *and not an express charge* against the shares *of the legatees* or *distributees of the decedent*. The legatees and distributees cannot in any sense be held to have 'received' any part of the duty that is paid to the Government by the executor or trustee or administrator as such estate tax, *and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent*, as was given the federal act of 1898 by the court in *Knowlton* v. *Moore, supra*."

The Federal Estate Tax Being Payable Under the Law of Illinois Out of the General or Gross Estate, It Cannot Be Said That the Tax Is Payable Out of the Residuary Estate Bequeathed to Charities.

The payment of the tax may operate to reduce the amount of the residuary estate, but this is not equivalent to saying, either directly or indirectly, that the tax *is pay-*

able, or is paid, *out of* the residuary estate, in the language of Section 807, since the amount of money represented by the tax, to which the *net taxable* estate has been subjected, the payment of which, to that extent, has lessened the general or gross estate, *has never been a part of the residuary estate or bequest.*

As the Supreme Court, in *People* v. *Pasfield*, 284 Ill. 450, 454, said:

> "The legatees and distributees cannot in any sense be held to have *'received'* any part of the duty (the Federal Estate Tax) that is paid to the government by the executor or trustee or administrator as such estate tax."

In re Holmes Estate, 40 S. W. (2) 616 (Mo.), at page 618, it is said:

> "The *residuary estate* is that which remains after all obligations constituting charges against the estate and all specific legacies and bequests have been met and discharged."

That the fact that the payment of the Federal Estate Tax out of the gross or general estate operates to reduce the residuary estate bequeathed to charities, is not equivalent to saying, that the tax is paid or is payable out of the residue, is most clearly and concisely stated by the Supreme Court of Wisconsin in *In re Bradley's Will*, 101 N. W. 393, where the Court said (pp. 394, 395):

> "The reasoning of these English cases is to the effect that by the use of the term *'residue'* a testator charges *upon the general estate* all debts, legacies and *other burdens; that no residue exists until such burdens have been paid.* In this view, it is *a solecism* to speak of discharging a debt or other charge *out of the residue*, or *by application* of any particular share of the residue. *Before the residue exists* for assignment or apportionment, all debts and burdens have necessarily and by very force of the terminology been paid, and do not exist. * * * By the payment of such burdens *out of the general estate*, the *residuary*

legacies are not abated. *True, the residue is lessened, but it is in only the residue,* whatever it may be *which is by the will given* to these legatees."

So, again, in *Corbin* v. *Townshend,* 103 Atl. 647, the Supreme Court of Connecticut said (p. 649):

"The federal act of 1916 imposes a tax *payable out of the estate before distribution,* thus differing from the federal inheritance tax of 1908, payable by the individual beneficiaries. It is not a tax upon specific legacies, *nor upon residuary legatees. It is taken from the net estate 'before the distributive shares are determined rather than off the distributive shares.'* Its payment diminishes *pro tanto* the share of each beneficiary. *The executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained.* It is an obligation against the estate and payable like any expense which falls under the head of administration expenses. *The tax paid is no part of the estate at the time of distribution; it has passed from the estate, and the share of the beneficiaries is diminished by just so much.*

"* * * *The payment of the federal tax is an expense of the estate, as much so as any expense of administration. Until this charge is paid the executor cannot receive his discharge, nor can the beneficiary receive his share.*"

In *McDougald* v. *Low,* 127 Pac. 1027, 1028, the Supreme Court of California said:

"Respondents in their brief correctly state that: 'The legatees at bar take by decedent's will the residue; *the residue is what remains after paying the legacies of the will and the debts and expenses of administration.*'"

The Supreme Court of the United States, in *Young Men's Christian Association* v. *Davis,* 264 U. S. 47, 51, speaking through Mr. Chief Justice Taft, said:

"It was wholly within the power of the testatrix to exempt her altruistic gifts from payment of the tax by specific direction to her executor if she chose.

It must be presumed, when she failed to exercise the power, that she intended the incidence of the tax to be where otherwise by law it must be, and therefore that it was her purpose that her *residuary legatees were to receive all that was left after paying all charges, including this tax, out of her estate.* * * * It is hardly true to say that under the judgment of Ohio courts *these residuary gifts are taxed.* The gifts are and were intended by the testator to be indefinite in amount, and to be what was left after paying funeral expenses, attorney's fees, executor's compensation, debts of the decedent, *and taxes. These donees do not pay the taxes, any more than they pay the funeral expenses, the lawyers, the executors, and the testator's debts.*"

In *United States* v. *Woodward*, 256 U. S. 632, 635, it was said:

"It (the Federal Estate Tax) does not segregate any part of the Estate from the rest and keep it from passing to the administrator or executor for purposes of administration as counsel contend, *but is made a general charge on the gross estate* and is to be paid in money out of any available funds or if there be none, by converting other property into money for that purpose."

Edwards v. Slocum, 264 U. S. 61 (Affirming 287 F. 651), Analyzed and Contrasted With the Case at Bar.

In the case at bar, Respondents computed the tax in identically the same manner as was held to be proper in *Edwards* v. *Slocum*, 264 U. S. 61, and as fully disclosed in the statement of the case and in a note to the decision of the Circuit Court of Appeals in that case in 287 F. 652, 654.

In the Slocum case, it was held and determined that, in order to ascertain the *net taxable estate*, there should be deducted from the gross estate, as provided in Section 303, in addition to the other statutory deductions, the

specific charitable bequests, and also *the entire residuary estate, all of which was bequeathed to charity,* amounting to $35,436,855.70.

In the case at bar, it was held and determined by the District Court and the Circuit Court of Appeals, in accordance with the Slocum case and Respondent's contentions, that, in order to arrive at the *net taxable estate,* there should be deducted from the gross estate the specific charitable bequests, and *the entire residuary* estate amounting to $463,103.08, all of which, as in the Slocum case, was bequeathed to charity.

In the Slocum case, the Commissioner objected to this, and restated the return by adopting all the Executor's figures except those for the residuary for charity, etc., which he reduced to $33,610,506.75, thereby increasing, as the Circuit Court of Appeals in its statement of the case said (p. 652), "the net (taxable) estate by the amount of the reduction", amounting to $1,826,348.95, and computed the tax thereon.

The Commissioner did identically the same thing in the case at bar. In the instant case, he reduced the *residuary* estate, bequeathed to charity, in the sum of $463,103.08 to $3,223.51, and added the difference of $459,879.57 to the net taxable estate and computed the tax thereon. The Federal Estate Tax on this augmented amount, when computed according to the Commissioner's method, by resort to algebraic formula, or other complicated arithmetical calculation, is $459,879.57 (R. 74-78), which is exactly the amount by which the Commissioner has reduced the residuary charitable deductions claimed by Respondents, or, in other words, the exact amount by which he has increased the net taxable estate.

So, also, in the Slocum case, the Court found the net taxable estate was increased by the amount of the higher tax assessed by the Commissioner.

This result, as Judge Hough said in the Slocum case (287 F. 651), "plainly involves paying an estate tax on the amount" of the tax assessed, and this was condemned by both the Circuit Court of Appeals and the Supreme Court in that case.

It will thus be seen that the discrepancy between Respondents' computation and the Commissioner's, arises because the Commissioner has added to the otherwise net taxable estate the amount of the Federal Estate Tax as computed by him, namely, $459,879.57, and has then recomputed the tax upon the otherwise taxable net estate, augmented by the amount of the tax, or, in other words, has computed *and imposed a tax upon the tax itself.*

It is apparent that the Commissioner, in computing the tax in the amount of $459,879.57, on the basis of allowing as deductions for residuary bequests to charities, the sum of only $3,223.51, was compelled to ascertain the amount of the allowable charitable deductions in order to compute the correct Federal Estate Tax, and simultaneously was required to determine the correct Federal Estate Tax in order to ascertain the allowable charitable deductions. This problem, involving two indeterminate unknown factors mutually dependent must, as was pointed out in the Slocum case, be solved by the application of the principles of algebra, and whether it can be solved otherwise, or not, it is conclusively apparent, that it necessarily involves complicated arithmetical calculations far beyond the comprehension of the average taxpayer. Even the Commissioner must realize what the Supreme Court of the United States had in mind when it said in the Slocum case that "algebraic formulae are not lightly to be imputed to legislators."

The Commissioner's computations speak for themselves. We can only suggest that the Court read them. Attempts to explain the Commissioner's computations only em-

phasize their complexity, as is shown by the stipulation of facts between the parties in this case, Plaintiff's Exhibit 1 (Record 71 at pages 74 to 78).

In order to analyze the Commissioner's computation, it is necessary to adopt the terms "true tax" and "trial tax," used by the Commissioner. These terms, which have been coined by the Commissioner, are without meaning when applied to a tax statute, unless the Commissioner is to be permitted to write his own dictionary.

There is no reference either in the statutes, imposing a Federal Estate Tax or in the applicable regulations, to such terms as "trial tax" and "true tax." Taxing statutes impose "taxes," and that is the only thing that can properly be considered.

It is not possible to ascertain the *trial tax* as found by the Commissioner in the amount of $340,310.88 without the use of an algebraic formula, nor is it possible for the taxpayer to understand why the Commissioner's formula of 1—1 (.34—[.8 x .10]) applied to the figure of $340,310.88 will produce the true tax, without an understanding of the principles of algebra.

In the light of the foregoing considerations, it is quite evident, it seems to us, why the Petitioner in the case at bar did not see fit to file a brief in support of his computations and his petition for a writ of certiorari.

Section 807 Being Clear and Unambiguous, Resort Cannot Be Had to the Alleged Legislative History.

Petitioner urges that the legislative history he refers to in his petition (namely, the House and Senate Reports, Appendix B, pages 13-15 of the Petition), shows that Congress intended, by the enactment of Section 807, to overcome the decision of *Edwards* v. *Slocum*, and to render that

decision inapplicable in the future, in situations presented in the case at bar.

In fact, it is manifest that Petitioner's real and ultimate contention is based upon the so-called legislative history of Section 807, and not on the plain and unambiguous language of that section.

The true, complete and controlling legislative history in the case at bar is to be found in the Revenue Act imposing the Federal Estate Tax, from its first enactment in 1916, and its Amendments to date, including Section 807. The language of this Act, and all its Amendments, is clear and unambiguous. It tells the whole story and history, without the necessity of going to the Reports of the House and Senate Committees referred to by Petitioner (Appendix B, pp. 13 and 15).

Permit us to refer briefly to the original Act, and its Amendments.

The Revenue Act of 1916 for the first time imposed a Federal Estate Tax upon *the net taxable estate* left by a decedent.

Section 203 (now Section 303) of this Act specified how this *net taxable estate* shall be ascertained, and provides that "for the purpose of the tax, the value of the *net estate* shall be determined" by deducting from the value of the *gross estate* certain specified items, such as funeral and administration expenses, claims against the estate, unpaid mortgages, etc.

This continued to be the prescribed method of determining *the net taxable estate*, for the purpose of imposing the Federal Estate Tax, until the year 1918, when, *for the first time*, the statute, by amendment, was made to provide for additional deductions from the gross estate, of all bequests, legacies and devises to defined charities, for the purpose of ascertaining the net taxable estate.

This was the state of the law at the time of *Edwards* v. *Slocum*, 264 U. S. 61 (decided February 18, 1924); and the Court, in applying the statute at that time in force, held that in arriving at the *net taxable estate*, not only the specific bequests to charities, *but also the full amount of the residuary estate bequeathed to charities*, should be deducted from the gross estate, for the purpose of ascertaining the net taxable estate.

In 1924, an Amendment identical in language with Section 807 was enacted. This Amendment is set out in the Petition as Appendix A, at page 10. This Amendment was repealed in 1926, but in 1932 was reenacted in its exact language, and is now in force as Section 807, under consideration in this case.

It will be noted that Section 807 *does not impose a tax*, but is merely designed to determine the amount of the deduction from the gross estate, provided for by Section 303 on account of bequests to charities, in order to arrive at the net taxable estate.

As the Circuit Court of Appeals said, in speaking of Section 807:

> "Section 807 *imposes no tax*. It merely declares that *in a certain event* the amount of the deductible bequest is the face amount of such bequest less the amount of such tax. The *contingent event* is that such tax or any part of it *is made payable*, in part or as a whole, *out of such bequest* by any of three means, that is to say—by the will, or by the State law of administrative jurisdiction, or by the law of the jurisdiction imposing the particular tax."

Again, as the Circuit Court of Appeals held, *"the certain event"*, or *"the contingent event"* in question did not arise in the case at bar because, under the law of Illinois, the law of administrative jurisdiction, the Federal Estate Tax *is not payable out of the bequest to charity*, whether specific or residuary, but, on the contrary, is specifically

made payable out of the general or gross estate, as an expense of administration, and hence Section 807 has no application to the case at bar, but leaves it determinable solely by the decision of the Supreme Court in *Edwards* v. *Slocum*.

The Revenue Act with its Amendments, including Section 807—and particularly Section 807—is clear and unambiguous, and does not require or permit resort to Petitioner's so-called legislative history.

The record and opinion of the Circuit Court of Appeals shows, that Petitioner in the District Court and in his brief in the Circuit Court of Appeals, admitted, to all intents and purposes, that Section 807 is not ambiguous.

As the Circuit Court of Appeals says, counsel for Petitioner in the District Court said (Rec. 201):

> "*The Government does not at all contend that this statute* (*Sec. 807*) *is ambiguous.* We simply want it clear that if the Court finds it ambiguous, the Court may examine anything it desires."

Neither the District Court, nor the Circuit Court of Appeals, found Sec. 807 ambiguous, but, on the contrary, found it unambiguous, and held that, under this section, pursuant to the laws of Illinois, "the law of the jurisdiction under which the estate is administered", the Federal Estate Tax *is not payable* out of the bequests to charity, whether residuary or specific, but is specifically *payable out of the gross* or *general estate*.

Furthermore, the Circuit Court of Appeals specifically found that petitioner conceded, in both the District Court and the Circuit Court of Appeals, that under the law of Illinois, the Federal Estate Tax is a paramount charge and expense of administration against the estate.

And, continuing, the Court of Appeals said that Petitioner "*seeks to parry* the force of the clear language of the section *by resort to legislative history*, in order to

arrive at what he claims to be the true policy and intent of Congress."

As the Circuit Court of Appeals said:

> "It is conceded that prior to the enactment of mandatory Section 807 of the Act of 1932, there was no federal enactment which authorized the deduction of a federal estate tax from residuary bequests to charities in fixing the net taxable estate. *Edwards* v. *Slocum*, 264 U. S. 61."

And, immediately continuing, the Court said:

> "Appellant concedes that the facts in that case (*Edwards* v. *Slocum*) are substantially identical with those here, except as to the amounts involved, and were it not for Section 807, the decision of the Supreme Court in *Edwards* v. *Slocum*, *supra*, would be controlling here."

So in the petition herein it is said (p. 6):

> "The situation is substantially identical with that presented in *Edwards* v. *Slocum*, 264 U. S. 61, in which the issue was decided against the government under the Revenue Act of 1918."

The question, however, is not primarily what Congress intended, but whether it translated its alleged intent into the language and phraseology of the enactment. It is fundamental that legislative intent must, if at all possible, be determined from the language employed. If the language employed be plain and unmistakable and unambiguous, which we insist is true of Section 807, and as was found by the District Court and the Circuit Court of Appeals, then the intent it reflects controls, whatever the legislative intent may have been outside of the enactment.

There are only two sources available, from one or both of which the Federal Estate Tax can be made payable, or can be paid. One is *out of* the *general or gross* estate, and the other is *out of bequests*, either specific or residuary. Sec. 807, by its plain and direct terms, extends only to

the second, namely, where either by the Will or by the law, the tax *is payable out of bequests* to charities, either specific or residuary, and it is only to this that Sec. 807 can, we submit, be held to apply. The law of this jurisdiction, Illinois, making the tax payable solely *out of the general or gross estate*, as an expense of administration, *and not out of the bequests* to charity, whether specific or residuary, Sec. 807 can have no application in the instant case.

If Congress had had in mind the payment of Federal Estate Taxes *out of the general or gross estate*, as well as the payment *out of the bequests to charities*, and thus had intended to cover *both sources* out of which payment could be made, it could easily have said so.

As the Circuit Court of Appeals said:

> "Appropriate language to this end, and to reach both alternatives, was readily available to it, which, however, it did not employ."

The Circuit Court of Appeals indicated it would have been a simple matter for Congress to have enacted a statute reading, that if by the Will, or by the law of administrative jurisdiction, the Federal Estate Tax is payable, either out of the *general or gross estate*, or out of *the bequests to charities*, either specific or residuary, then the reduction in the amount of the charitable exemption provided for in Section 807, should be made.

In Support of the Cogent Reasons Why the Alleged Legislative History of Section 807, and Petitioner's Construction of This Section, Should Not Influence the Court in Granting the Writ Prayed for, We Urge the Following Well-Established and Fundamental Principles of Law:

(a) Legislative history cannot be resorted to unless there be an ambiguity of language in the Act sought to

be construed, and this is especially applicable where a tax statute is involved.

Hamilton v. *Rathbone*, 175 U. S. 414.
Thompson v. *United States*, 246 U. S. 547, 551.
Old Colony Railroad Co. v. *Commissioner*, 284 U. S. 552, 560.

(b) A Court cannot enact a law under the pretense of construing one.

Heiner v. *Donnan*, 285 U. S. 312, 331.
United States v. *Goldenberg*, 168 U. S. 95, 102.

(c) It is a universal rule that tax-imposing statutes are to be construed strictly against the taxing power, and in favor of the taxpayer.

Gould v. *Gould*, 245 U. S. 151, 153.
United States v. *Merriam*, 263 U. S. 179, 187, 188.

(d) The law exempting charitable bequests should be liberally construed to favor the same.

Harrison v. *Barker Annuity Fund*, 90 F. (2d) 286.
United States v. *Pleasants*, 305 U. S. 357.
United States v. *Proprietors of Social Law Library*, 102 F. (2d) 481, 482.
Union & New Haven Trust Company v. *Eaton*, 20 F. (2d) 419.

(e) Construction is against double taxation.

State of Tennessee v. *Whitworth*, 117 U. S. 129, 137.

(f) For greater reason, construction is against a tax upon a tax.

Edwards v. *Slocum*, 264 U. S. 61, 63.
Edwards v. *Slocum*, 287 F. 651, 655 (C. C. A. 2d).

Clark v. *United States*, 27 F. (2d) 887, 888 (D. C. Mass.).

Old Colony Trust Co. v. *Malley*, 15 F. (2d) 105, 106 (D. C. Mass.).

Nichols v. *Leach*, 50 F. (2d) 787, 792 (C. C. A. 1st).

(g) The long established practice of the law is not to regard the incidence of a tax in the levying of a tax.

Edwards v. *Slocum*, 264 U. S. 61.

(h) Algebraic formulae are not lightly to be imputed to legislators.

Edwards v. *Slocum*, 264 U. S. 61, 63.

Conclusion.

We respectfully submit that the petition in this case should be denied.

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